STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-431

August 6, 2002

OFFICE OF THE PUBLIC ADVOCATE AND
RAYMOND SHADIS ET. AL
Petitions to Initiate Proceedings Concerning
Central Maine Power Company's Potential Sale of its
Interest in Vermont Yankee Nuclear Power Corporation
To Entergy Vermont Yankee, LLC

ORDER (PART II)

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In our Order Part I in this docket, issued on July 31, 2002, we announced our decision to deny two petitions, one by the Public Advocate and the other by Raymond Shadis and 18 other persons, that asked the Commission to investigate the proposed sale of the nuclear power plant owned by Vermont Yankee Nuclear Power Corporation (Vermont Yankee) to Entergy Nuclear Vermont Yankee (Entergy) and the provision that would require the non-Vermont sponsors (shareholders) of Vermont Yankee, including Central Maine Power Company (CMP), to assign to Entergy the non-Vermont sponsors' rights to any excess decommissioning funds. Each petition also asked the Commission to stop CMP from executing an Assignment of Rights to Excess Decommissioning Funds in favor of Entergy pending the investigation. In this Order Part II, we explain our reasoning behind our decision to deny both requests.

II. BACKGROUND

CMP is a 4% equity owner in Vermont Yankee and is entitled to a corresponding 4% share of the nominal capacity and related energy output of the Vermont Yankee plant located in Vernon, Vermont. The terms and conditions of CMP's entitlement to the plant's output are set forth in a Power Contract and an Additional Power Contract.

Since 1999, Vermont Yankee has explored with several entities the potential sale of its nuclear plant. Vermont Yankee and Entergy entered into a purchase and sale agreement in August 2001 providing for the sale of the nuclear plant to Entergy. In one of the provisions of the agreement, Vermont Yankee and Entergy agreed to divide equally any excess funds remaining in the decommissioning trust fund after decommissioning of the facility was complete. However, in approving the purchase and sale agreement, the Vermont Public Service Board required that all excess decommissioning funds be paid to Vermont Yankee for distribution to the Vermont Yankee sponsors. In letters filed with the Vermont Public Service Board, Entergy stated that the Board's requirement concerning excess decommissioning funds was not satisfactory to Entergy. To accomplish the sale of the plant as contemplated in the purchase and sale agreement, the non-Vermont sponsors of Vermont Yankee agreed to

enter into an Assignment of Rights of Excess Decommissioning Funds.[1] Under this arrangement, Vermont sponsors of Vermont Yankee would receive a pro rata share of excess decommissioning funds in proportion to their ownership share in Vermont Yankee. Non-Vermont sponsors, including CMP, would relinquish their rights to excess decommissioning funds in exchange for a one-time payment of $1.5 million (to be prorated among the non Vermont sponsors) to be funded by the Vermont sponsors. By letter to the Vermont Public Service Board on July 22, 2002, Vermont Yankee stated that this arrangement concerning excess decommissioning funds was made in response to the Board's condition, and that the arrangement was acceptable to Vermont Yankee, the Vermont and non-Vermont sponsors and Entergy.

On July 25, 2002, the Public Advocate filed a petition asking the Commission to initiate proceedings to review, investigate, and take appropriate action with respect to the proposed Assignment of Rights to Excess Decommissioning Funds. Further, as Entergy and Vermont Yankee intended on completing the sale of the power plant on July 31, 2002, the Public Advocate requested that the Commission order CMP to refrain from executing the proposed Assignment of Rights to Excess Decommissioning Funds pending the requested Commission investigation.

On July 26, 2002, CMP filed a request to decline to open investigation in response to the Public Advocate's petition. CMP asserts that no Commission action is necessary or warranted before CMP proceeds in regards to the closing of the sale of the Vermont Yankee plant to Entergy.

On July 29, 2002, Raymond Shadis, as lead complainant, and 18 other persons filed a complaint pursuant to 35-A M.R.S.A. § 1302(2). The complainants sought relief similar to that asked for by the Public Advocate in his July 25 petition, including a temporary restraining order preventing CMP from executing documents necessary to complete the Vermont Yankee plant sale to Entergy. The complainants also expressed support for the Public Advocate's July 25 petition and asked to intervene in his proceeding.

The Public Advocate's request and the Raymond Shadis complaint have been consolidated and are processed jointly under this single docket number. The complainants' petition to intervene in the OPA's request is therefore moot.

On July 30, 2002, the Commission held a conference of counsel to discuss the petitions. The Public Advocate, Raymond Shadis, and CMP participated at the conference. Also on July 30, 2002, counsel for the Conservation Law Foundation petitioned to intervene in this docket. Although his petition had not been formally ruled upon, counsel for CLF participated in the conference.

[1] Non-Vermont sponsors own 45% of the shares of Vermont Yankee.

III. DECISION

The Public Advocate and the Raymond Shadis et. al complaint (collectively referred to as "Petitioners") seek two actions by the Commission. First, they ask for a Commission investigation of CMP's assignment of excess decommissioning funds to Entergy, followed by "appropriate action" in regards to CMP's proposed assignment. Second, they ask the Commission to stop CMP from executing the Assignment pending the Commission investigation.

We address the second request first. Although the Raymond Shadis complaint expressly asks for a temporary restraining order (TRO), the Public Advocate's petition effectively asks for similar injunctive relief by seeking an order directed at CMP to refrain from executing the Assignment of Rights to Excess Decommissioning Funds. Section 1304(5) of Title 35-A authorizes the Commission to grant injunctive-like relief. In deciding to issue a temporary order under section 1304 (5):

> The Commission shall consider the likelihood that [the remedy sought in the temporary order] would be issued at the conclusion of the proceeding, the benefit to the public or affected customers compared to the harm to the utility or other customers of issuing the order and the public interest.

35-A M.R.S.A. § 1304(5). These criteria are similar if not identical to the four criteria that the Law Court has held a plaintiff must meet in order to obtain a preliminary or permanent injunction:

> (1) that plaintiff will suffer irreparable injury if the injunction is not granted;
> (2) that such injury outweighs any harm which granting the injunctive relief would inflect on the defendant;
> (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and
> (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982)

From the petitions and conference, it is clear that the harm alleged by the petitioners relates solely to the Assignment of Rights to Excess Decommissioning Funds and not to any other aspect of the sale of the Vermont Yankee power plant. The Public Advocate asserts that the assignment by CMP would constitute an abandonment of its ratepayers' share of excess decommissioning funds in violation of CMP's duty to mitigate stranded costs. The complainants argue that federal regulation mandates that any surplus in the decommissioning trust belongs to the ratepayers and must be returned to them. The complainants conclude that CMP's Assignment will be illegal.

The harm from denying ratepayers the excess decommissioning funds is significant, Petitioners assert, because substantial dollars are at stake. The Trust Fund presently has about $300 million. With decommissioning not expected to be complete until 2024 or even 2040, the Trust balance will have grown substantially. Raymond Shadis and counsel for CLF cited an expert in the Vermont proceeding who concluded that excess funds could be significant, as much as $100 million. In Petitioners view, CMP should be prevented from selling its rights to the excess funds for such a small sum (about $135,000) today.

CMP responded that the $1.5 million to be paid to the non-Vermont sponsors was calculated to be the present value of the expected amount of the excess decommissioning funds if decommissioning is complete about 2040. CMP further argues that, regardless of the correct valuation of the rights to excess decommissioning funds, Maine ratepayers will not be harmed if CMP goes forward with the Vermont Yankee sale because the Commission retains the ability to review the prudence of CMP's actions.

At the conference, we inquired of CMP as to the consequences if it did not execute the Assignment of Rights to Excess Decommissioning Funds. Representatives of CMP stated that Entergy would have the legal right to terminate the Purchase and Sale Agreement with Vermont Yankee, but that CMP did not know what action Entergy would take.

We have previously ruled that CMP does not need Commission approval of a sale by Vermont Yankee of the nuclear power plant. While prior approval is not necessary, CMP's actions will be reviewed during the next stranded cost rate proceeding to assess whether the Company has reasonably mitigated stranded costs. *Central Maine Power (Petition for Disclaimer of Jurisdiction or Alternative Request for Approval of Sale of Vermont Yankee Nuclear Power Plant)* Docket No. 99-928 (June 2, 2000). Furthermore, in CMP's most recent stranded cost case, we accepted a stipulation that required CMP to defer the financial consequences of any sale of Vermont Yankee so that the full effect could be flowed through to ratepayers, provided CMP acted prudently. *Central Maine Power Co.,* Docket No. 2001-232, (Feb. 15, 2002).

Thus, we find that ratepayers suffer greater harm if we issue an order that prevents CMP from executing the Assignment of Rights to Excess Decommissioning Funds than ratepayers will suffer if no order is issued. All of the harm alleged by petitioners is financial in nature. We are confident that even if the sale is closed and it turns out that Petitioners' allegations are true and CMP's acceptance of the Assignment was not a reasonable means to mitigate stranded costs, we can protect ratepayers from suffering any adverse financial consequences in the next stranded cost rated proceeding.

The potential for harm to ratepayers is greater if we issue a temporary order and prevent CMP from executing the Assignment. The failure to execute

the Assignment will give Entergy the right to terminate the sale agreement. Indeed, the Petitioners do not desire to stop the sale from occurring. Generally, the terms of the sale are viewed positively.[2] Petitioners only want to stop the assignment of excess decommissioning funds, because, in their view, it is inequitable or even unlawful for anyone other than ratepayers to receive those funds.

The fact that no party seeks to stop the sale suggests to us that all parties perceive a risk that a future sale will be less beneficial. CMP rightly points out that, generally, the generation asset market is less robust now than mid-2001. If the Commission takes action that prevents the sale from closing, the harm that occurs if the Entergy sale is the most beneficial cannot be repaired by the Commission in the ratemaking process. Thus, we conclude that there is likely greater harm if we grant the temporary order sought by Petitioners.

Our conclusions concerning the harm that will occur both with and without the temporary order Petitioners seek obviate the need for further analysis. We note however, that although the Petitioners may have demonstrated the possibility of proving both that CMP's assignment of excess decommissioning funds was harmful and not necessary to close the sale, we cannot conclude that the Petitioners are more likely than not to prevail on this question.

Even though we deny the Petitioners' request, we do not intend to minimize the concerns they raise. We have not evaluated whether the non-Vermont sponsors will benefit more or less than the Vermont sponsors – although based on the limited evidence before us, given a choice, we would prefer the Vermont option. However, we are not presented with that simple choice (and neither was CMP). By blocking CMP from accepting the non-Vermont treatment, Entergy has the legal ability to terminate the sale. The Commission (and ratepayers) would then take the risk that the Entergy sale would not take place and that a future sale would not be as beneficial.[3] The Petitioners have not convinced us that we should depart from the regulatory approach adopted in Docket No. 99-928: CMP will decide whether the sale of Vermont Yankee is the most reasonable means to mitigate stranded costs, and the Commission will review CMP's actions in the next ratemaking proceeding.

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[2] In an order on July 26, 2002, the Vermont Public Service Board found that benefits of the sale outweigh the negatives of the incentive Entergy has to cut corners in decommissioning when Entergy receives 45% of the cost cutting. Therefore, the Vermont Board did not stop the sale from occurring even though the non-Vermont sponsors had agreed to assign their excess decommissioning funds to Entergy. Vermont Yankee Nuclear Power Corporation, Docket No. 6545 (Vt. PSB)

[3] One benefit that seems especially relevant in this context is the provision in the sale agreement that makes Entergy and not the selling utilities responsible for any deficiency in the decommissioning trust fund.

We also decide that a separate and immediate investigation into the Entergy sale is not warranted. We have already demonstrated, by accepting the Stipulation in Docket No. 2001-232, that we will review the prudence of the Vermont Yankee sale in our next stranded cost rate case. The Petitioners have not offered any reason why that investigation should begin now rather than later. The Petitioners can be sure that we will begin that next stranded cost rate investigation with sufficient time to fully review the Entergy-Vermont Yankee sale.

All necessary ordering statements were made in Order Part I and need not be repeated here.

Dated at Augusta, Maine, this 6th day of August, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

This document has been designated for publication.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.